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1 UNITED STATES DISTRICT COURT  
2 SOUTHERN DISTRICT OF NEW YORK

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3 UNITED STATES OF AMERICA,

4 v.

11 CR 878 (LAK)

5 VLADIMIR TSASTSIN,

6 Defendant.

7 -----x

8 New York, N.Y.

9 May 12, 2015

3:30 p.m.

10 Before:

11 HON. LEWIS A. KAPLAN,

12 District Judge

13 APPEARANCES

14 PREET BHARARA

15 United States Attorney for the

16 Southern District of New York

17 SARAH LAI

Assistant United States Attorney

18 ROTHMAN, SCHNEIDER, SOLOWAY & STERN

Attorneys for Defendant

19 JEREMY SCHNEIDER

20 DAVID STERN

LUCAS ANDERSON

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(In open court)

DEPUTY CLERK: United States against Tsastsin.  
Government, are you ready?

MS. LAI: Yes, Sarah Lai for the government. Good  
afternoon.

THE COURT: Good afternoon.

DEPUTY CLERK: For the defendant?

MR. SCHNEIDER: Jeremy Schneider, David Stern, and  
Lucas Anderson on behalf of Vladimir Tsastsin.

THE COURT: Good afternoon.

I'll hear from the defendant. Let's try to do it in  
20 minutes, if we could.

MR. SCHNEIDER: Well, your Honor, I guess what I would  
like to do is, if it's okay with your Honor, is generally I  
don't feel the need to repeat what is up here because I have  
confidence that you read it.

It's our position, though, that what appears to may  
have not passed sniff test because it may appear to be illegal,  
the fact is it's not -- the conduct here was not illegal. The  
conduct here does not fit either within the wire fraud statute  
or the computer fraud statute. The conduct here may have been  
annoying to computer users, but what you have here is computer  
users who are given a choice to either authorize or not  
authorize a licensing agreement.

THE COURT: And where in the indictment will I find

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1 that?

2 MR. SCHNEIDER: You won't.

3 THE COURT: That's why you lose --

4 MR. SCHNEIDER: Well --

5 THE COURT: -- on of that argument.

6 MR. SCHNEIDER: I'm just giving you general  
7 background. The argument here is in the indictment all they  
8 talk about, your Honor, is the victims being the end computer  
9 users. They don't talk about the victims in the indictment as  
10 the advertisers. They don't talk about victims --

11 THE COURT: What rule of procedure requires that they  
12 identify by use of the word "victim" each and every victim of  
13 the scheme, or category of victim?

14 MR. SCHNEIDER: I think the rule of procedures is that  
15 they have to give you notice of who you will be defending  
16 against.

17 THE COURT: You know that.

18 MR. SCHNEIDER: Well, I know, and the fact is there  
19 are no victims. The victims that they named -- not that they  
20 named, they alleged -- were the victims of the end of the  
21 computer use, not the advertisers. Because the advertisers did  
22 not lose one penny. The advertisers were not victims. There  
23 was nothing obtained --

24 THE COURT: I don't understand that at all. Maybe you  
25 can explain to me why that is so, because I don't get it.

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1 MR. SCHNEIDER: What's easy is that the advertisers  
2 paid -- had an agreement with the defendants. The agreement is  
3 that if such and such -- if someone clicks on to my  
4 advertisement, you will get -- you, the defendant, will get a  
5 certain amount of money. That's what it's about.

6 At some point a computer user decides to do a search,  
7 that computer user either searches for a particular item, let's  
8 say the IRS, whatever it is, and a number of different  
9 advertisements come up. They are never precluded from getting  
10 what they want. They are never prevented from getting to the  
11 web site that they want.

12 THE COURT: Suppose that I'm the advertising manager  
13 for Subaru and I enter into a contract with your client --

14 MR. SCHNEIDER: Yes.

15 THE COURT: -- to pay for clicks by people who meet a  
16 demographic, or however else they target this kind of  
17 advertising, I don't profess to be an expert at all, who I  
18 think, as the Subaru advertising director, are people who are  
19 red hot candidates to buy a Subaru. And by virtue of what your  
20 clients did, what I get is people who were actually looking for  
21 Dr. Scholls insoles for shoes because their feet hurt.

22 Now they make that search, but their demographics are  
23 totally different. My Subaru ad gets hit all right, but it  
24 gets hit by a category of people entirely different from what I  
25 thought I was signing up to get.

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1 MR. SCHNEIDER: They wouldn't hit on that category,  
2 because if I'm looking for a Subaru and all the sudden I hit a  
3 particular advertisement and something comes up for  
4 Dr. Scholls, I'm not going to click on Dr. Scholls, I will keep  
5 looking until I get to Subaru.

6 THE COURT: Mr. Schneider, I'm afraid you can talk  
7 faster than I can listen at my age.

8 MR. SCHNEIDER: I apologize.

9 THE COURT: Try me again.

10 MR. SCHNEIDER: I certainly will, and I promise I'll  
11 be slower.

12 If I, as the user, are looking for a Subaru, if  
13 another advertisement pops up that is not what I'm looking for,  
14 I am not going to click on that.

15 THE COURT: But that's not my hypothetical.

16 MR. SCHNEIDER: The advertiser gets paid as a result  
17 of a click, not just if it pops up.

18 THE COURT: I know that. But I don't for a minute  
19 think, and certainly I can't assume on a motion to dismiss the  
20 indictment, that the world is so simple that the only people I,  
21 as the advertising director of Subaru, am interested in getting  
22 to click on my site are people who say ah-hah, I want to look  
23 at the Subaru web site. What I may want to get is people who  
24 have bought through mail order products that males in a certain  
25 income category from 27 to 42 tend to look for because that

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1 demographic has a much higher chance of buying a Subaru than  
2 people who are looking for insoles for their old-man, old-lady  
3 shoes.

4 MR. SCHNEIDER: I have a couple of responses. Number  
5 one, that is not anywhere alleged in the indictment, your  
6 scenario.

7 THE COURT: But it's not negated either.

8 MR. SCHNEIDER: But I think it is, because the  
9 government's theory on this indictment -- if you look at the  
10 four corners of the indictment -- is that the computer users,  
11 based on the activity of the defendants, the defendants  
12 affected that individual computer's use, according to the  
13 government; not the advertisers, not the Subaru-looking --

14 THE COURT: But of course, because by infecting the  
15 computers they affected the category of people who wound up  
16 clicking on your defendant's advertisers' links or sites or  
17 whatever the right word is, but they get a different population  
18 of people than they thought they were getting.

19 MR. SCHNEIDER: A few things. One, the indictment and  
20 the government does not allege that those advertisers are the,  
21 quote, victims, number one.

22 THE COURT: What says they have to?

23 MR. SCHNEIDER: I believe that --

24 THE COURT: Why isn't it sufficient if a properly  
25 instructed jury could find that the advertisers are victims?

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1 MR. SCHNEIDER: Because I think the government is now  
2 trying to amend the indictment significantly where it would  
3 change the whole theory of their prosecution and thereby  
4 changing the theory of our defense. Because I have to defend  
5 against who I think the victims are, not who the advertisers  
6 are, number one.

7 Number two, again regarding the Subaru advertiser,  
8 regardless of who their demographic is, if the person who is on  
9 the computer sees that it is not the advertisement that they  
10 are looking for, they will not click on it. Therefore, the  
11 advertiser -- it just pops up, when it pops up they see this is  
12 not what I want, and they don't click on it. They don't say:  
13 What is this about? Just because it pops up doesn't mean the  
14 user looks at it and uses it. They look at it, see this is not  
15 what I want, let me keep looking for something else and then I  
16 will find something else.

17 THE COURT: And I would find that in the indictment  
18 where?

19 MR. SCHNEIDER: That's exactly my point. You won't.  
20 That's exactly the point.

21 THE COURT: So the premise of your argument I'm not  
22 going to find in the indictment.

23 MR. SCHNEIDER: Yes. The answer is yes. The premise  
24 of my argument is that you need to find the victims. I'm  
25 prepared to address with you who the victims are and why they

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1 are not in fact victims according to the government's theory.

2 So you're right, you can look at the indictment all  
3 you want and you will not see what I'm saying, because what I'm  
4 saying is not part of the government's theory in the four  
5 corners of the indictment. And I addressed why we believe the,  
6 quote, victims, were not victims, because nothing was obtained  
7 or nothing was given up by them, their computers were not  
8 destroyed or damaged, they were not in a position where any  
9 information or data was taken or where they would be --

10 THE COURT: Let me ask you this, I'm looking at  
11 paragraph five of the indictment, to pick one at random: As a  
12 result of this scheme, the defendants and their co-conspirators  
13 reaped at least 14 million in ill-gotten gains through click  
14 hijacking and advertising replacement fraud.

15 Now the only money that changed hands was the payment  
16 by the advertisers to the defendants. Isn't it entirely  
17 appropriate for a jury, depending on the evidence, to conclude  
18 that the people who paid the \$14 million were victims; maybe  
19 not the only victims, but victims

20 MR. SCHNEIDER: There's a difference between being the  
21 only victims if you have, say, ten of the same category -- in  
22 other words, if they're all -- if the government only alleges  
23 let's say five advertisers but include five more advertisers at  
24 trial but it's the same concept, that's different. This is  
25 changing the entire theory.



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1 THE COURT: You're all wound up, and I appreciate it.  
2 Good lawyers get wound up on their client's behalf. But try to  
3 stay with me, because I know what you're arguing and I see  
4 holes in it, and I'm trying to address the holes.

5 MR. SCHNEIDER: I understand.

6 THE COURT: That's what I'm trying to get at. I know  
7 you think that because in one place they said the computer  
8 owners or whatever were victims, I know that's your argument.  
9 I got it.

10 MR. SCHNEIDER: Okay.

11 THE COURT: But I'm saying the indictment alleges that  
12 \$14 million in ill-gotten gains came from advertisers. Now  
13 what I don't understand is why that isn't good enough all by  
14 itself.

15 MR. SCHNEIDER: Because I believe not one advertiser  
16 has ever spoken to the government to say we are objecting to  
17 what happened, we don't like what happened. This is purely  
18 speculative. The advertisers could be very happy. They could  
19 have said: You know what? We thought that there was one  
20 demographic out there, and all the sudden we have a result of  
21 all the people we didn't think about and got all this  
22 advertisement and we're happy to pay the defendant. We have  
23 not idea. It's speculative. It's not something that the  
24 government has any knowledge of or facts of.

25 DEPUTY CLERK: Suppose your guy was involved in

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1 selling a used car --

2 MR. SCHNEIDER: A Subaru?

3 THE COURT: Could be a Subaru.

4 -- and he thinks it's got 40,000 miles on it, because  
5 that's what your client told him, and he got a premium price  
6 for that Subaru, your client, and the use of mails were  
7 involved in the sale. But he rolled back the odometer, it  
8 really had 100,000 miles. You think it's a defense to a mail  
9 fraud claim to say --

10 MR. SCHNEIDER: Completely different.

11 THE COURT: You don't even know the question yet.

12 You think it's a defense to a mail fraud claim to say  
13 well, the guy who bought the Subaru with 100,000 miles on the  
14 representation that it had 40,000 miles is prepared to come in  
15 and say I'm perfectly happy? You think that's a defense?

16 MR. SCHNEIDER: If he thought he wasn't defrauded, if  
17 he don't lose anything. But the fact is, that's different.

18 THE COURT: He did lose something.

19 MR. SCHNEIDER: That car is not worth the same thing,  
20 100,000 versus 40,000.

21 THE COURT: Right. And the guy who winds up on this  
22 web site is not the same thing as the guy who would have gotten  
23 there but for the fraud. It's not the same viewer.

24 MR. SCHNEIDER: To obtain property from someone,  
25 physical property from someone that has value, it has value,

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1 it's valued at one thing when it has 40,000 miles and it's  
2 valued another way at 100,000 miles. If you get somebody to  
3 pay more than it's worth because you mislead them, that is  
4 fraud. This is not the same thing. You have no idea if  
5 anybody was misled. You don't know if the advertisers were  
6 happy or not. You don't know if they felt misled. This is not  
7 just speculation, but even accepting what they say --

8 THE COURT: None of those things is an element of mail  
9 fraud conviction.

10 MR. SCHNEIDER: The element of mail fraud conviction  
11 is property was obtained --

12 THE COURT: By false or fraudulent pretenses, and the  
13 mail was used in furtherance.

14 MR. SCHNEIDER: What property was obtained  
15 fraudulently?

16 THE COURT: Money that the advertisers paid to your  
17 clients.

18 MR. SCHNEIDER: Number one, I don't mean to keep  
19 repeating, but that's not what the indictment says.

20 THE COURT: I just read it to you.

21 MR. SCHNEIDER: You read the background of this  
22 scheme. That is not the same thing as identifying them as  
23 victims. That's number one. That's not -- that's the  
24 background portion of the indictment, not in the counts of the  
25 indictment, not in the specific wire fraud, computer fraud

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1 counts of the indictment.

2 THE COURT: If you have another point I suggest you  
3 move to it, because that one is not -- my understanding of it  
4 is not being enhanced by repetition.

5 MR. SCHNEIDER: That's what I started out by saying.  
6 I understand. I don't feel the need to go into any other  
7 specifics. I believe that whatever is in our papers is  
8 actually compelling. Whether you chose to accept it, that's  
9 why you're the judge sitting there. I believe that what we  
10 say, the law is good, I think in terms of the facts here and  
11 the statutes, I think the government is trying to put this  
12 conduct into illegal activity that has not been considered by  
13 the legislature. That I think is significant.

14 I think the rule of levity is when there's a doubt as  
15 to how the statute should be interpreted should go to the  
16 defendant. I think that's something that applies here. There  
17 has not been one case that has addressed the click fraud or  
18 advertising hijacking situation criminally. The civil cases  
19 that have addressed it have found this to be maybe bad  
20 advertising, maybe poor business activity, but not illegal, and  
21 not even civilly liable.

22 And I think that's significant, because like your  
23 Honor has a reaction to the conduct, I think that reaction is  
24 not supported by the statute the way it is now. At some point  
25 the legislature can fix it. They may want to change the

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1 statute. They may want to amend it or have a new statute that  
2 applies to this particular conduct, but I think this conduct is  
3 not covered by the statute as it's charged and is not alleged  
4 in the indictment appropriately.

5 THE COURT: Okay. Thank you.

6 Ms. Lai.

7 MS. LAI: Judge, I haven't heard anything that was not  
8 already in the briefs which the government has addressed in  
9 great detail. So unless the Court has any questions, we simply  
10 rely on our brief.

11 THE COURT: Well, I'm very interested in why the  
12 government either didn't refer at all or certainly didn't rely  
13 on Salinas Doria on the *non bis in idem* argument.

14 MS. LAI: Why we didn't rely on the *non bis in idem*  
15 argument?

16 THE COURT: No, why you didn't rely on the Salinas  
17 case, which is the case that says that *non bis in idem* doesn't  
18 apply at all in circumstances like this. *Non bis in idem* is an  
19 objection available to someone as against the requested state  
20 in an extradition, not as a defense to the offense for which  
21 the person was extradited, to a receiving state by the  
22 requested state, which seems to me to sweep the boards. So I  
23 don't understand what I'm missing here as to why the government  
24 didn't even rely on it.

25 MS. LAI: Is this the Second Circuit case that the

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1 defense cited? I couldn't hear the name of the case.

2 THE COURT: It's Salinas, Judge Lynch's case while on  
3 the district court.

4 MS. LAI: I'm not familiar with that case. I didn't  
5 come across it, your Honor.

6 THE COURT: Okay. Well, I guess that's the answer.

7 MS. LAI: But the Second Circuit case that the defense  
8 did rely on the government believes to be dictum because the  
9 decision was not based -- there was a lot of discussion about  
10 looking at the conduct rather than the specific offense.

11 THE COURT: I agree with you that it's dictum. You're  
12 talking about Sindona, right?

13 MS. LAI: Yes.

14 THE COURT: But Sindona had been extradited from  
15 Italy, is that right?

16 MR. SCHNEIDER: To Italy.

17 THE COURT: It was an Italian extradition request. He  
18 was facing indictment here, right? And it's a different  
19 circumstance, in addition to being dictum, and arguably wrong  
20 anyway, which one doesn't say about Judge Friendly too often.

21 Well, the long and short of it is I guess you didn't  
22 have Judge Lynch's decision. But I was also curious at the  
23 fact that the government didn't place any reliance that I  
24 noticed on the text of the extradition treaty with Estonia,  
25 which says, very differently from the Italian treaty:

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1 Extradition shall not be granted when the person sought has  
2 been convicted or acquitted in the requested state for the  
3 offense for which extradition is requested.

4 It doesn't say anything about prosecution on the other  
5 side. There's no agreement by the United States not to  
6 prosecute somebody extradited from Estonia for an offense of  
7 which the person had been convicted or acquitted in Estonia,  
8 which is essentially what the Italian treaty said.

9 So why can't this *non bis in idem* be resolved simply  
10 on the basis of the text of the treaty? Estonia extradited  
11 him. The treaty says nothing more than they won't extradite  
12 him if they think he's been acquitted or convicted of the  
13 offense. Doesn't say anything about what we're going to do.

14 MS. LAI: Right. They agreed to extradite based on  
15 their reading of the case there. The Court could resolve it  
16 that way, and I appreciate the Court coming up with better  
17 arguments than I have.

18 THE COURT: I didn't mean to suggest that, but that  
19 really follows from Judge Lynch's decision.

20 MS. LAI: I was focused on the word "offense," which  
21 is the defense argument.

22 THE COURT: Yeah.

23 MS. LAI: The treaty does say the same offense.

24 THE COURT: I understand. I understand the whole  
25 Blockburger argument, but Blockburger is a lot more complicated

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1 argument than the text of the treaty.

2 MS. LAI: Yes.

3 THE COURT: All right. Thank you.

4 MS. LAI: Thank you.

5 THE COURT: Anything else?

6 MR. SCHNEIDER: No, your Honor.

7 THE COURT: Okay, I appreciate it. Thank you. Some  
8 interesting issues. I will reserve decision, but now we're  
9 down for trial when?

10 MR. SCHNEIDER: I believe September 28.

11 THE COURT: September?

12 MS. LAI: 28.

13 MR. SCHNEIDER: 28.

14 THE COURT: We may have to make a tiny adjustment in  
15 that. How long a trial is it likely to be, Ms. Lai, now that  
16 we're further down the road?

17 MS. LAI: I still think it will be about a month,  
18 three weeks to a month.

19 THE COURT: Defense agree with that?

20 MR. SCHNEIDER: If that's their case it will be longer  
21 because we'll be presenting a case, I presume.

22 THE COURT: We have a little bit of a scheduling  
23 problem here. The multidistrict panel is sitting the end of  
24 the week of the 28th of September. If we start on the 28th,  
25 we're not going to sit Wednesday, Thursday or Friday that week.



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1 Now maybe we'll just do that.

2 Then I have to be at a multidistrict panel event out  
3 of town all or most of the week of October 26. So if this is  
4 really a four-week trial, this is going to get complicated. If  
5 it's really going to be four weeks plus, we can start on the  
6 28th and go as far as we can and then resume the following week  
7 and we'll have a dark week or part of a week.

8 MR. SCHNEIDER: That's fine with us, Judge.

9 THE COURT: Any problem?

10 MS. LAI: No, your Honor, that's fine.

11 THE COURT: Then we'll plan on that, and we'll work  
12 around these other commitments. It will be a busy fall.

13 Thanks very much.

14 o0o